

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No. 07-CR-171

DAVID SZYMUSZKIEWICZ,

Defendant.

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Defendant David Szysmuszkiewicz, by his attorneys Gimbel, Reilly, Guerin & Brown, submits the following jury instructions for use at trial. These proposed instructions include the Court's standing instructions, modified where necessary, and substantive instructions.

Dated this 26th day of September, 2008.

GIMBEL, REILLY, GUERIN & BROWN

By: /s/ Patrick J. Knight

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COURT'S INSTRUCTION NO. ____

DEFENDANT'S PROPOSED INSTRUCTION NO. 1

THE CHARGE AGAINST THE DEFENDANT

The indictment reads as follows:

COUNT ONE

THE GRAND JURY CHARGES:

1. On or about January 22, 2004, in the City of Racine, in the State and Eastern District of Wisconsin,

DAVID S. SZYMUSZKIEWICZ,

the defendant herein, did intentionally and unlawfully intercept an electronic communication using a computer.

2. The communication is more particularly described as an email from N.I. to D.A.S. with the subject line "RE: Ratings."

All in violation of Title 18, United States Code, Section 2511(1)(a).

COUNT TWO

THE GRAND JURY FURTHER CHARGES:

1. On or about February 6, 2004, in the City of Racine, in the State and Eastern District of Wisconsin,

DAVID S. SZYMUSZKIEWICZ,

the defendant herein, did intentionally and unlawfully intercept an electronic communication using a computer.

2. The communication is more particularly described as an email from T.M.M. to N.I. with the subject line "FW Fraud Referral" and an attachment with the title "smime.p7m."

All in violation of Title 18, United States Code, Section 2511(1)(a).

COUNT THREE

THE GRAND JURY FURTHER CHARGES:

1. On or about April 27, 2006, in the City of Racine, in the State and Eastern District of Wisconsin,

DAVID S. SZYMUSZKIEWICZ,

the defendant herein, did intentionally and unlawfully intercept an electronic communication using a computer.

2. The communication is more particularly described as an email from N.I. to S.E.W. with the subject line "FW: BRP" and an attachment with the title "SBSE Universal BRP1.xls."

All in violation of Title 18, United States Code, Section 2511(1)(a).

COURT'S INSTRUCTION NO. ____

DEFENDANT'S PROPOSED INSTRUCTION NO. 2

ELEMENTS OF THE OFFENSE

David Szymuskiewicz is charged with intentionally intercepting an electronic communication contrary to section 2511(1)(a) of Title 18 of the United States Code. To prove that David Szymuskiewicz committed a violation of section 2511(1)(a), the government must prove each of the following elements beyond a reasonable doubt. First, that David Szymuskiewicz intercepted an electronic communication. Second, that David Szymuskiewicz intercepted an electronic communication intentionally.

In this context, to “intercept” means to acquire the contents of any electronic communication by using any electronic, mechanical or other device.

An “electronic communication” means any transfer of signs, signals, writing, images, sounds, data or intelligence in any nature, transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce.

Source: 18 U.S.C. § 2510 (4) and (12); 18 U.S.C. § 2511(1)(a), A. Hugh Scott, COMPUTER AND INTELLECTUAL PROPERTY CRIM.: FEDERAL AND STATE LAW, Ch. 5, pp. 60-61.

COURT'S INSTRUCTION NO. ____

DEFENDANT'S PROPOSED INSTRUCTION NO. 3

DEFINITION: INTENTIONALLY

The government must prove beyond a reasonable doubt that David Szymuskiewicz acted intentionally when, according to the government, he intercepted an electronic communication using a computer. Before you can find that David Szymuskiewicz acted intentionally, you must be satisfied beyond a reasonable doubt that he acted deliberately and purposefully. That is, David Szymuskiewicz's acts must have been the product of his conscious objective rather than the product of a mistake or accident.

Source: L. Sand, *et al.* MODERN FEDERAL JURY INSTRUCTIONS – CRIMINAL, ¶3A-01, Instruction 3A-4, p. 3A-17 (2008); *United States v. Townsend*, 987 F.2d 927, 930 (2^d Cir. 1993); *see also United States v. Smith*, 467 F.2d 1126, 1129-30 (7th Cir. 1972) (failure to instruct as to *scienter* or specific intent as an element of the offense is reversible error).